

Classification of Tribal Rights-of-Way and Valuation Implications

Thomas H. Shipps
Maynes, Bradford, Shipps & Sheftel, LLP

Department of the Interior/Department of Energy
Section 1813 Right-of-Way Study

April 18, 2006
Denver, Colorado

Right of Way Defined

- A right-of-way or easement is the right to use the land of another for a specific purpose.
- The owner of the right-of-way is said to own a dominant estate.
- The owner of the land is said to own the servient estate.
- Generally, the owner of the servient estate retains all rights and benefits of land ownership, except those that may be inconsistent with the easement use.

General Classifications

- Easements or Rights-of-way have often been classified in a number of different ways, for example: (i) perpetual – existing so long as the right-of-way is needed for the specific use intended; (ii) limited duration – for a fixed period of time described in the right-of-way instrument.
- In Section 1813 of the Energy Policy Act of 2005, Congress directed that a study be conducted on a new classification, i.e., “energy rights-of-way on tribal lands.”

Energy Rights-of-Way

This is an exceedingly broad term. There are a myriad of examples of Energy Rights-of-Way over tribal lands:

- Well lateral pipelines lines that connect oil or gas wells to gathering systems
- Gathering lines that connect oil or gas wells or central delivery points to processing or treatment plants
- Transmission pipelines from gas processing or treatment plants to end users or gas distribution systems
- Gas distribution system pipelines that delivery gas to consumers
- Oil or liquid hydrocarbon transmission pipelines that transport oil to or from refineries
- Lines that transport carbon dioxide or water to oil or gas fields for use in tertiary recovery

Energy Rights-of-Way, cont'd

- Water delivery pipelines that deliver water produced from wells to disposal facilities
- Electric transmission lines that connect generating stations to substations or transformers
- Electric distribution lines that delivery electricity to consumers
- Road rights-of-way needed for access to wells, pipelines, generating stations, transmission or distribution facilities, or other energy facilities
- Roads for hauling coal from mine to market
- Easements for trimming shrubbery or vegetation related to energy facilities

Congress provided no guidance or limit on the scope of energy rights-of-way to be studied. However, the circumstance leading to the study arose in the context of compensation negotiations related to renewal of a FERC-regulated interstate gas transmission line crossing 900 miles of Navajo Nation lands.

Factors Affecting Duration and Compensation

From a tribal perspective, easements or rights-of-way might also be classified by purpose and potential benefit:

- i) Will the facility located within the right-of-way provide utilities or services needed by tribal members?
- ii) Will the facility contribute to the development and management of tribal resources for economic benefit to the tribe?
- iii) Is the only benefit to the tribe the compensation to be received for consenting to the grant or renewal of the right-of-way?
- iv) How will the granting of the easement affect tribal lands, environmental resources, cultural resources, or sacred sites?
- v) What control will the Tribe retain regarding jurisdiction, assignability, and regulatory compliance?

Factors Affecting Industry Use of Tribal Lands

- Does the route across tribal lands save expense because it is the shortest route or because its use will avoid the complications of dealing with multiple landowners on non-tribal land?
- Is acquisition of a right-of-way needed to provide tribal members or the tribe with vital services?
- How will durational limitations or tribal compensation affect project economics?

Identifying Mutual Interests

- Necessary Tribal member services – mutual interests include reliability and extended duration
- Tribal economic development – a balance of extended duration and other economic interests is appropriate
- No direct local benefit through services – creative investigation to confirm no benefit

Uniform Policies and methodologies

- Necessary Tribal member services – uniform policies of extended duration and minimal compensation
- Tribal economic development – compensation and duration may vary based on balancing of interests
- No direct local benefit through services – compensation based upon highest negotiated value